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Unreasonable and Imperfect: Constitutionality of the Louisiana Medical Malpractice Act's Limit on Recovery

Mark Johnson was a robust and healthy 38-year-old mechanic when he sought corrective treatment for a foot abnormality.¹ During his procedure, doctors accidentally cut a tendon and severed an artery in Johnson's leg. Doctors repaired the tendon, but did not realize that oxygen-supplying blood was no longer flowing into Johnson's foot. When the error was finally discovered, a vascular surgeon attempted to repair the artery but failed. Johnson watched as his foot blackened, the tissue dying from oxygen loss. Doctors finally informed him that his lower leg would have to be amputated. Despite using a prosthetic leg, Johnson was no longer able to work under cars, control a clutch, or even drive small automobiles.

A \$460,000 check, the award amount remaining after legal fees and a statutorily imposed cap that limited his medical malpractice damages, did little to ease Johnson's worries. In consideration of his \$50,000 salary, Johnson had asked for \$1.4 million in damages. Frustrated, he finally sought treatment from a psychiatrist and began taking antidepressants. Johnson is a resident of California and is subject to the State's \$250,000 statutory cap on noneconomic damages.²

Could the same scenario happen in Louisiana? With damages in excess of a statutory cap, could a seriously injured victim face an arbitrary limit? The State of Louisiana similarly limits a plaintiff's recovery in a medical malpractice action against a health care provider. Part I of this Comment sets out the history of Louisiana's limitation on liability and discusses the recent constitutional controversy over this statute. Part II argues that the general damages cap is unconstitutional under the Louisiana Constitution, utilizing analysis of the Equal Protection and Access to Courts Clauses. Finally, Part III compares several states' solutions to the constitutionality issue, discussing indicators for wages and inflation.

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1. *A Bitter Remedy in Medical Malpractice; Courts: Painful Litigation Rarely Satisfies Either the Patient or the Doctor*, LOS ANGELES TIMES, May 28, 2000, at A1. Facts of an actual medical malpractice case taken from newspaper series on medical malpractice reform in California.

2. CAL. CIV. CODE § 3333.2 (West 1997).

I. BACKGROUND AND HISTORY OF THE MEDICAL MALPRACTICE ACT'S LIMITATION ON LIABILITY

In the mid-1970s, the Louisiana legislature faced several difficult decisions concerning the liability of the State's health care providers. Across the nation state legislatures were concerned with excessive damage awards and rising medical malpractice insurance costs.³ Along with almost every other state, Louisiana passed a statute in response to "the medical malpractice crisis."⁴ The problem was actually two-fold: issues of availability and affordability.⁵

The crisis of availability was specifically linked to the exit of major medical malpractice insurance providers who experienced significant losses during the early 1970s.⁶ This insurance exit trend was a major concern for doctors; in a 1975 national survey, doctors in sixteen states reported "difficulty" in obtaining coverage that they considered a precondition to their individual practices.⁷

In addition to issues regarding availability, the Louisiana legislature was also concerned that the skyrocketing costs would price many health care providers out of the remaining market. Doctors and insurance companies reported that, depending on a doctor's individual area of practice, the price of some medical malpractice insurance premiums increased as much as 500%.⁸ Several states, including Louisiana, adopted policies consistent with the theory that "[t]he most direct way to alleviate insurance cost pressures on medical practitioners is by statutes designed to limit the amount of damages recoverable in a medical malpractice action."⁹ Proponents of such statutes argued that jury awards were one of the major reasons for premium increases, considering that

3. DAVID W. LOUISELL & HAROLD WILLIAMS, *Damage Caps—In General*, in 3 MEDICAL MALPRACTICE ¶ 18.15 (LexisNexis 2008) (1960).

4. *Sibley v. Bd. of Supervisors of La. St. Univ.*, 446 So. 2d 760, 765 (La. App. 1st Cir. 1983), *aff'd*, 462 So. 2d 149 (La.), *aff'd in part, rev'd in part on reh'g*, 477 So. 2d 1094 (La. 1985), *on remand*, 490 So. 2d 307 (La. App. 1st Cir. 1986).

5. M. Roy Schwarz, *Liability Crisis: The Physicians' Viewpoint*, in MEDICAL MALPRACTICE-TORT REFORM 16, 17 (James E. Hamner III & B.R. Jennings eds., 1987). See generally MICHELLE M. MELLO, UNDERSTANDING MEDICAL MALPRACTICE INSURANCE: A PRIMER 6 (2006), http://www.rwjf.org/pr/synthesis/reports_and_briefs/pdf/no10_primer.pdf.

6. *Id.*

7. PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 85 (1985).

8. *Id.* at 97.

9. STEVEN E. PEGALIS, 2 AMERICAN LAW OF MEDICAL MALPRACTICE 297 (3d ed. 2005).

juries were more likely to irrationally overcompensate malpractice victims with awards for noneconomic damages, such as pain and suffering.¹⁰

A. The Louisiana Statute, Revised Statutes Section 40:1299.42

The Louisiana State Legislature passed Act No. 817 on July 14, 1975,¹¹ and the Governor signed the act on August 4.¹² The act, codified in Louisiana Revised Statutes section 40:1299.42,¹³ amended the Revised Statutes by adding a new part concerning medical malpractice.¹⁴ Subsection B of the statute provides: "The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in Revised Statutes section 1299.43, shall not exceed five hundred thousand dollars plus interest and cost."¹⁵

The details of Louisiana's medical malpractice statute, including the application of the liability cap, are best explained by examining the process by which a victim brings a potential claim. Initially, a potential plaintiff must submit the claim to a medical review panel.¹⁶ That claim must be brought against a qualified healthcare provider.¹⁷ First, the panel considers all evidence in the

10. Kevin J. Gfell, Comment, *The Constitutional and Economic Implications of a National Cap on Non-Economic Damages in Medical Malpractice Actions*, 37 IND. L. REV. 773, 779 (2004).

11. H.B. 1465, Reg. Sess. (La. 1975).

12. 1975 La. Acts No. 817 (codified at LA. REV. STAT. ANN. § 40:1299.41–1299.49 (2008)).

13. LA. REV. STAT. ANN. § 40:1299.42(B)(1) (2008).

14. 1975 La. Acts No. 817.

15. § 40:1299.42(B)(1).

16. § 40:1299.47(A)(1).

17. § 40:1299.41(A)(1), defining "health care provider" as:

a person, partnership, limited liability partnership, limited liability company, corporation, facility, or institution licensed or certified by this state to provide health care or professional services as a physician, hospital, nursing home, community blood center, tissue bank, dentist, registered or licensed practical nurse or certified nurse assistant, offshore health service provider, ambulance service under circumstances in which the provisions of R.S. 40:1299.39 are not applicable, certified registered nurse anesthetist, nurse midwife, licensed midwife, pharmacist, optometrist, podiatrist, chiropractor, physical therapist, occupational therapist, psychologist, social worker, licensed professional counselor, licensed perfusionist, or any nonprofit facility considered tax-exempt under Section 501(c)(3), Internal Revenue Code, pursuant to 26 U.S.C. 501(c)(3), for the diagnosis and treatment of cancer or cancer-related diseases, whether or not such a facility is required to be licensed by this state, or any professional corporation a health care provider is authorized to form under the

case¹⁸ including all medical information and the affidavits and testimony of expert witnesses.¹⁹ The panel then issues its opinion on whether the defendant qualified health care provider acted or failed to act within the appropriate standard of care.²⁰ The potential plaintiff can then choose—depending on the favorable or unfavorable opinion of the panel—to take his issue to trial.

If the plaintiff takes his complaint to court and the court rules in his favor, the qualified health care provider is personally liable for damages up to \$100,000.²¹ If the plaintiff's award is in excess of that amount, the remainder, up to \$500,000, is paid from the Patient's Compensation Fund (PCF).²² The PCF is a custodial fund held by the state to pay medical malpractice claimants.²³ Qualified health care providers annually pay into the PCF in accordance with rates determined by the Louisiana Insurance Rating Commission.²⁴

The limitation on liability in section 40:1299.42 is an absolute cap on a victim's recovery such that all damages, other than future medical costs, cannot exceed \$500,000. Future medical expenses are not subject to the cap.²⁵

The principal purpose of enacting the Medical Malpractice Act was to limit health care providers' liability and to provide compensation to medical malpractice victims.²⁶ Limitations on liability were generally believed to yield a decrease in medical malpractice frequency and severity, as well as a decrease in costs

provisions of Title 12 of the Louisiana Revised Statutes of 1950, or any partnership, limited liability partnership, limited liability company, management company, or corporation whose business is conducted principally by health care providers, or an officer, employee, partner, member, shareholder, or agent thereof acting in the course and scope of his employment.

18. § 40:1299.47(D)(1).

19. § 40:1299.47(D)(2).

20. § 40:1299.47(G).

21. § 40:1299.42(B)(2).

22. § 40:1299.42(B)(3)(a). *See also* § 40:1299.44.

23. § 40:1299.44(A)(1).

24. *See* § 40:1299.44(A)(2).

25. FRANK L. MARAIST & THOMAS C. GALLIGAN, *Health Care Providers—An Overview* § 21.03[5], in LOUISIANA TORT LAW 21–22 (2d ed. 2004) (stating that future medical expenses include all medical expenses, but the finder of fact determines which medical expenses are considered necessary). *See also* Sarah R. Levin, Comment, *The Medical Malpractice System and the Payment of Future Medical Damages: On Life Support Elsewhere, Resuscitated in Louisiana*, 68 LA. L. REV. 955 (2008) (explaining the payment of medical damages to victims of medical malpractice through the Louisiana patient's compensation fund).

26. *St. Paul Fire & Marine Ins. Co. v. EUSEA*, 775 So. 2d 32, 36 (La. App. 1st Cir. 2000), *writ denied*, 791 So. 2d 116 (La. 2001).

to healthcare providers, to provide for health care insurance available at reasonable rates, and finally to ensure medical malpractice victims prompt adjudication and reasonable recovery.²⁷ In an editorial supporting the statute's passage, the *Baton Rouge Morning Advocate* cited to the burgeoning costs of malpractice insurance as a principal reason for the limitation on liability.²⁸ The legislation, according to the editorial, was comparable to measures in Indiana, California, Florida, and Alabama.²⁹ Most importantly, the article billed the limitation on recovery as "adequate" but conceded that "in future years this amount could be upped if inflation continues and the costs of living keeps going up."³⁰

B. The Current Controversy and the Louisiana Third Circuit Court of Appeal

The Louisiana Third Circuit Court of Appeal recently considered two cases concerning the constitutionality of the cap.³¹ Both cases are significant because they indicate a willingness on the part of courts to consider economic arguments in favor of finding the limitation on liability unconstitutional.³² The cases are also examples of circumstances likely to reoccur, indicating that not only has this been a prior issue for the courts, but also that it will continue to arise.

On October 28, 1994, William Arrington died at the Lake Area Medical Center in Lake Charles, Louisiana.³³ His doctor, Richard Samudia, was found to have committed malpractice in connection with Arrington's death.³⁴ The Medical Malpractice Act limited Dr. Samudia's personal liability to \$100,000.³⁵ On August 15, 2000,

27. LOUISELL & WILLIAMS, *supra* note 3.

28. Editorial, *Malpractice Bill Is Sensible Solution*, THE ADVOCATE (Baton Rouge), June 19, 1975, at A22.

29. *Id.*

30. *Id.*

31. *Arrington v. ER Physicians Group*, 940 So. 2d 777, 779 (La. App. 3d Cir. 2006), *vacated*, 947 So. 2d 724 (La. 2007); *Taylor v. Clement*, 940 So. 2d 796, 797 (La. App. 3d Cir. 2006), *rev'd*, 947 So. 2d 721 (La. 2007).

32. *See Arrington*, 940 So. 2d at 784 ("The trial judge found that *because of the depreciation of the dollar*, the \$500,000.00 cap imposed in 1975 is worth only about \$160,000.00 today. That conclusion is supported by the evidence. *The defendant argues that the passage of time, the devaluation of the dollar, and other relevant economic factors are irrelevant in determining whether an adequate remedy in law exists. We disagree.*" (emphasis by the court)).

33. *Id.* at 779.

34. *Id.*

35. *Id.*

the plaintiffs also settled the related claim against the Louisiana Patient's Compensation Fund for \$500,000.³⁶ Nevertheless, the plaintiffs appealed to the Louisiana Third Circuit Court of Appeal, seeking to have the limitation on liability in section 40:1299.42 declared unconstitutional.³⁷

At the same time, another challenge to the medical malpractice cap was moving through the court system. On June 22, 2001, a trial court awarded Charles and Sharon Taylor damages in excess of the statutory limit in a medical malpractice claim.³⁸ The Taylors appealed to the Louisiana Third Circuit Court of Appeal, seeking to have the limitations on their recovery imposed by the Medical Malpractice Act declared unconstitutional.³⁹ Despite differences in the cases' assignments of error, the main premise of the suits was the same: the unconstitutionality of the damages cap. As such, the third circuit joined the two cases and certified a question to the Supreme Court of Louisiana for instructions on the following question of law:⁴⁰

Considering the devaluation of the dollar in the thirty years since the passage of the medical malpractice act is such that the \$500,000.00 limit imposed in 1975 is now, according to competent evidence, worth only \$160,000.00, and considering that Section 22 of Article I of the Louisiana Constitution of 1974 provides Louisiana citizens with an "adequate remedy" under our law, *is the limitation on recovery for general damages of \$500,000.00 imposed by the Louisiana Medical Malpractice Act, [Louisiana Revised Statutes section] 40:1299.41, et seq., still considered constitutional?*⁴¹

The supreme court denied certification of the question on June 17, 2005, and remanded the case to the third circuit.⁴² Undeterred in both cases, the third circuit held that the Medical Malpractice Act's limitation on liability was unconstitutional,⁴³ stating: "In

36. *Id.*

37. *Id.*

38. *Taylor v. Clement*, 940 So. 2d 796, 797 (La. App. 3d Cir. 2006), *rev'd*, 947 So. 2d 721 (La. 2007).

39. *Id.*

40. *Arrington v. ER Physicians Group*, 897 So. 2d 911, 913 (La. App. 3d Cir.), *cert. denied*, 904 So. 2d 708 (La. 2005). *See also Taylor v. Clement*, 897 So. 2d 909, 911 (La. App. 3d Cir.), *cert. denied*, 904 So. 2d 708 (La. 2005).

41. *Taylor*, 897 So. 2d at 911 (emphasis added).

42. *Arrington*, 904 So. 2d 708; *Taylor*, 904 So. 2d 708.

43. *Arrington v. ER Physicians Group*, 940 So. 2d 777, 784 (La. App. 3d Cir. 2006), *rev'd*, 947 So. 2d 724 (La. 2007). *See also* LA. CONST. art. I, § 22 (stating "[a]ll courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial,

either case, we find the current \$500,000.00 cap fails to provide an adequate remedy to today's severely injured plaintiffs and thus, is unconstitutional under the provisions of [Louisiana Constitution article 1, section 22]."⁴⁴

Both cases went back to the supreme court for consideration of the third circuit's determination of unconstitutionality. The court vacated the *Arrington* and *Taylor* judgments on procedural grounds, stating:⁴⁵ "It is well-established that litigants must raise constitutional challenges in the trial court rather than in the appellate courts, and that the constitutional challenge must be specially pleaded and the grounds for the claim particularized."⁴⁶

Despite this procedural issue and the supreme court's hesitance to look at the constitutionality question anew, the Louisiana Medical Malpractice Act's limitation on liability is unconstitutional under the Louisiana State Constitution, article 1, sections 3 and 22. Policy considerations also demand that the state re-examine the malpractice cap. Under the provisions of the limitation, Louisiana residents will not receive adequate compensation for injuries caused by medical malpractice if the damages exceed \$500,000. Additionally, as the dollar value of the cap continues to fall, the utility of tort damages as a deterrent to medical malpractice will also fall.⁴⁷ Considering Louisiana's substantial interest in this area of regulation, the state should amend the liability cap to allow for an inflation multiplier that will keep pace with real prices and medical expenses. An inflation multiplier would not only provide a slight increase in the cap each year, but it would also provide a real connection between actual economic conditions and the value of the cap. Such a multiplier allows the cap to adequately provide compensation in accordance with real dollar values.

partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights"); *Taylor v. Clement*, 940 So. 2d 796, 798 (La. App. 3d Cir. 2006), *rev'd*, 947 So. 2d 721 (La. 2007).

44. *Arrington*, 940 So. 2d at 784; *Taylor*, 940 So. 2d at 798.

45. *Arrington v. Galen-Med, Inc.*, 947 So. 2d 719, 719 (La. 2007). *See also Taylor v. Clement*, 947 So. 2d 721, 722 (La. 2007).

46. *Arrington*, 947 So. 2d at 720.

47. DANZON, *supra* note 7, at 3 (stating "that if the tort system is to be evaluated on grounds of economic efficiency, then it can be justified, if at all, only by its performance in deterring negligent behavior").

II. THE CONSTITUTIONALITY OF THE MEDICAL MALPRACTICE ACT'S LIMITATION ON LIABILITY

The Louisiana Supreme Court has upheld the constitutionality of the cap in several cases.⁴⁸ Challenges to the statute asserted constitutional questions under article 1, sections 3 and 22, the Equal Protection and Access to Courts Clauses.

A. Article I, Section 3: The Equal Protection Clause

The Louisiana State Constitution's Equal Protection clause provides:

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations.⁴⁹

The equal protection analysis in previous challenges focused on two aspects of section 3: the arbitrariness, capriciousness, or unreasonableness of the cap and the discrimination inherent in classifying medical malpractice victims.

1. The Limitation as Arbitrary, Capricious, or Unreasonable

The major case to dispense with the argument that the cap was arbitrary is *Butler v. Flint Goodrich Hospital*.⁵⁰ The *Butler* court concluded that "the Louisiana Medical Malpractice Act represents a *reasonable but imperfect* balance between the rights of victims and those of health care providers. It does not violate the state . . . constitution."⁵¹ Acknowledging the medical malpractice insurance crisis and the legislature's intent to respond to the crisis, the supreme court affirmed lower court jurisprudence that the limitation on liability does not involve fundamental rights.⁵²

The court upheld the cap's reasonableness, and the Medical Malpractice Act in general, on three grounds. First, the structure of the act is such that it increases the likelihood that physicians or

48. *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992); *Williams v. Kushner*, 549 So. 2d 294 (La. 1989).

49. LA. CONST. art. I, § 3.

50. *Butler*, 607 So. 2d at 521.

51. *Id.* (emphasis added).

52. *Id.*

other health care providers will have malpractice insurance.⁵³ Second, victims have a greater assurance of collecting from a solvent fund under the structure of the Patient's Compensation Fund.⁵⁴ Finally, the court stated that the act provides for the payment of all medical care and related benefits.⁵⁵

The Louisiana Supreme Court's quick rejection of the constitutional argument lacks a complete analysis of the statute's provisions for certain medical malpractice victims. Despite the arguments that qualified health care providers are more likely to carry malpractice insurance and the Patient's Compensation Fund provides a solvent source of damages, the limitation on liability does not provide payment of all medical care and benefits.

As noted in the facts of *Taylor v. Clement*,⁵⁶ a plaintiff who receives a verdict in excess of the statutory cap may not recover damages above the \$500,000 limit. Instead of providing recovery of complete medical costs, expenses, and damages, the statutory cap arbitrarily cuts off a plaintiff's recovery in the statutorily set area of general damages. A hypothetical plaintiff could prove lost wages alone above the statutory cap and not recover the full extent of that loss or additional damages for claims such as pain and suffering. As the real dollar value of the cap decreases over time due to inflation and cost considerations, the limitation is likely to severely restrict victims' compensation. Not only does the strict limitation set an arbitrary thirty-two-year-old limit on recovery, but the cap will grow more and more unreasonable as its real value decreases.

Other cases indicate the unreasonableness of the cap. The Louisiana limitation on liability is a general damages cap; it is intended to put a ceiling on all damages, save those for future medical expenses.⁵⁷ As such, damages like lost wages are included within the limitation. In *Arrington*, the family's economic loss alone was valued at over \$477,000.⁵⁸ The court noted that the figure did not account for the likely periodic increases in the deceased's income.⁵⁹ The argument that a \$500,000 ceiling will adequately cover damages is absurd. Wages, along with costs, will

53. *Id.*

54. *Id.*

55. *Id.*

56. *Taylor v. Clement*, 940 So. 2d 796, 797 (La. App. 3d Cir. 2006), *rev'd*, 947 So. 2d 721 (La. 2007).

57. LA. REV. STAT. ANN. § 40:1299.42(B)(1) (2008).

58. *Arrington v. ER Physicians Group*, 940 So. 2d 777, 783 (La. App. 3d Cir. 2006), *vacated*, 947 So. 2d 724 (La. 2007).

59. *Id.*

continue to rise.⁶⁰ The *Butler* analysis relied on the all-encompassing nature of the cap; the cap indeed likely provided reasonable recovery under costs and economic conditions in the 1970s and 1980s. Normal economic changes in price will vitiate the rationale cited in *Butler*. As a firmly cemented limit on recovery, the cap will grow more unreasonable as prices change. Continuation of the statute as its 1975 limit makes much of the defense offered for it in *Butler* obsolete.

Other state courts have utilized this line of reasoning. The Illinois Supreme Court did so in *Wright v. Central Du Page Hospital*.⁶¹ That court used similar economic reasoning to find the state's cap arbitrary. Holding that the \$500,000 limitation on recovery in medical malpractice actions was arbitrary, the Illinois court concluded that the classification created a special class,⁶² an additional argument discussed later in this Comment. While the court did concede that the legislation could decide to completely abolish a cause of action, it stated, "[w]e have consistently held that to the extent that recovery is permitted or denied on an

60. See generally Federal Reserve Board's Semiannual Monetary Policy Report to the Congress, Before the Comm. on Banking, Housing, and Urban Affairs, 108th Cong. (2004) (testimony of Chairman Alan Greenspan), available at <http://www.federalreserve.gov/boarddocs/hh/2004/july/testimony.htm> (proposing that inflation is a long-term monetary phenomena).

61. *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736, 743 (Ill. 1976).

62. *Id.* The term "special class" is an equal protection analysis term of art, used to define a classification beyond what is considered an ordinary classification. An ordinary classification groups people based on some benign or behavioral characteristic. Examples of ordinary classifications include income tax brackets and persons who go above the speed limit. Ordinary classifications face rational basis scrutiny, whereby the challenged statute's "ends" must be rationally related to that statute's "means." See also BLACK'S LAW DICTIONARY 1290 (8th ed. 2004) (defining rational-basis test as the "criterion for judicial analysis of a statute that does not implicate a fundamental right or a suspect or quasi-suspect classification under the Due Process or Equal Protection Clause, whereby the court will uphold a law if it bears a reasonable relationship to the attainment of a legitimate governmental objective"). For the example of speed limits, state and local governments promote safe driving (the end) and they maintain that policy by enforcing speed limits (the means). Therefore, convictions for speeding are not constitutionally infirm. A classification creating a special class, however, faces a higher level of scrutiny because of the rights involved. Strict scrutiny, the highest protection analysis, is reserved for suspect classifications such as race and fundamental rights. See also BLACK'S LAW DICTIONARY 1462 (8th ed. 2004) (defining strict scrutiny as the "standard applied to suspect classifications (such as race) in equal protection analysis and to fundamental rights (such as voting rights) in due-process analysis" and stating that "[u]nder strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question").

arbitrary basis a special privilege is granted in violation of the Illinois Constitution.”⁶³

A Louisiana victim of medical malpractice may not recover in excess of \$500,000 (not considering future medical expenses) despite evidence or even a jury finding that the victim is so entitled. The decades-old limitation sets an arbitrary damages cap which does not account for inflation or other economic indicators. The limitation is unreasonable because, as the broader economic market changes, the cap will fall short in providing “an adequate remedy” for medical malpractice victims.

2. The Creation of Classes: Two Groups of Medical Malpractice Victims

The second field of analysis under the Equal Protection clause concerns the classification of medical malpractice victims. The Medical Malpractice Act creates two groups: (1) victims whose damages fall within the statutorily allowed limit; and (2) victims whose general damages are above the \$500,000 cap. The Louisiana Supreme Court in *Sibley v. Board of Supervisors of LSU* specifically discussed the Medical Malpractice Act with reference to the legislative power to limit certain actions.⁶⁴

Sibley concerned a plaintiff's challenge to the limitation on liability as infringing on constitutional guarantees.⁶⁵ The plaintiff asserted that the cap created classifications based on the level of injury: seriously injured victims as opposed to those less seriously injured.⁶⁶ The injured party also argued that the creation of the two classes was unreasonable and arbitrary; additionally, the classification rested upon grounds lacking a fair and substantial relation to the legislative intent.⁶⁷ The court disagreed, finding that the statutory limit did not create a prohibited classification under equal protection.⁶⁸

The court also held that the limitation did not restrict a fundamental right.⁶⁹ As cited in *Sibley*, fundamental rights include freedom of expression and association and the right to participate

63. *Wright*, 374 N.E.2d at 743.

64. 462 So. 2d 149, 157 (La.), *aff'd in part, rev'd in part on reh'g*, 477 So. 2d 1094 (La. 1985), *on remand*, 490 So. 2d 307 (La. App. 1st Cir. 1986).

65. *Id.* at 154.

66. *Id.* at 155.

67. *Id.* See also *supra* note 62 and accompanying text for a discussion of strict scrutiny.

68. *Sibley*, 462 So. 2d at 155.

69. *Id.*

in the electoral process.⁷⁰ The Louisiana Supreme Court did not consider the right to full tort recovery to fall amongst those fundamental rights, and generally "mere unequal treatment under a statutory scheme is . . . not grounds for finding a statute unconstitutional."⁷¹

The *Sibley* court concluded that the Medical Malpractice Act was subject to a rational basis test⁷² under which the classification need only be "rationally related" to a legitimate legislative objective.⁷³ The court wrongly applied such a narrow definition to the equal protection argument, however, and the plaintiff's classification argument should be considered under a higher intermediate level of scrutiny.

Grossly injured (and therefore more needing of compensation) medical malpractice victims cannot receive full recovery. All other medical malpractice victims with damages below the cap receive full compensation. This classification is unreasonable simply because the value of the cap has dwindled to a level that is so unreasonably low.

A number of other jurisdictions have grappled with the constitutional analysis appropriate to medical malpractice limitations on liability.⁷⁴ In *Carson v. Maurer*, the Supreme Court of New Hampshire specifically stated that the right to recover for one's injuries is not a fundamental right.⁷⁵ Instead of applying the lower rational basis test, however, the court applied a heightened standard of review.⁷⁶ The court determined that in a medical malpractice action "the rights involved . . . are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test."⁷⁷ The court used the following standard—"whether the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation"⁷⁸—to declare New Hampshire's medical malpractice statute

70. *Id.* The Louisiana Supreme Court enumerated examples of additional fundamental rights at length including: right to interstate travel, right to fairness in the criminal process, right to fairness in procedures concerning governmental deprivations of life, liberty or property, and right to privacy. *Id.*

71. Gfell, *supra* note 10, at 791.

72. *Sibley*, 462 So. 2d at 157.

73. Gfell, *supra* note 10, at 791.

74. See generally *Brannigan v. Usitalo*, 587 A.2d 1233, 1234 (N.H. 1991); *Carson v. Maurer*, 424 A.2d 825, 830 (N.H. 1980), *overruled by* Cmty. Res. for Justice, Inc. v. City of Manchester, 917 A.2d 707 (N.H. 2007).

75. *Carson*, 424 A.2d at 830.

76. *Id.*

77. *Id.*

78. *Id.* at 831.

unconstitutional under its equal protection analysis.⁷⁹ The analysis utilized, as opposed to rational basis scrutiny, required a more substantial connection between the classification and the purpose of the legislation.

In holding its malpractice cap unconstitutional, the North Dakota Supreme Court also applied an intermediate standard of review. In *Arneson v. Olson*, the court required “a close correspondence between statutory classification and legislative goals” in its analysis of the statute’s constitutionality.⁸⁰ The intermediate test utilized by these jurisdictions is vitally important to the Louisiana issue because it recognizes that, although strict scrutiny should not apply, medical malpractice limitations must meet some form of heightened scrutiny. These courts were willing to show deference toward state legislatures that enacted caps while balancing the state interest against tort victims’ need for recovery. The importance to Louisiana is to show that the cap itself is not per se unconstitutional, but that a cap which dips so low because of inflation becomes unreasonable for tort victims.

Judge Cooks highlighted a similar argument in his *Arrington* dissent, utilizing article 1, section 3 when he stated that the majority “‘fouled up their navigation’ in failing to mention” that constitutional article.⁸¹ Cooks stated that when the state provides an adequate remedy to one class—presumably those medical malpractice victims with damages below \$500,000—but denies an adequate remedy to other members of the same class based on their physical condition, the state’s justification is analyzed under heightened scrutiny.⁸² Cooks’s language is important—by classifying all members of the class into one group, medical malpractice victims, the basis of the distinction between remedies is the level of physical disability or harm.

The application of a heightened standard requires a significant connection between the legislation in question and the legislative intent. In the case of Louisiana, the Medical Malpractice Act must have such a relation to the statute’s goals. As stated previously, the purpose of this legislation was to limit health care providers’ liability and to provide compensation to medical malpractice

79. *Id.* at 838.

80. Janai M. Powell, Note, *Challenging the Constitutionality of Noneconomic Damage Caps: Boyd v. Bulala and the Right to a Trial By Jury*, 24 WILLAMETTE L. REV. 821, 825 (1988).

81. *Arrington v. ER Physicians Group*, 940 So. 2d 777, 786 (La. App. 3d Cir. 2006) (Cooks, J., dissenting).

82. *Id.* at 790.

victims.⁸³ As the limitation stands now, the balance between these interests is grossly skewed in favor of protecting health care providers, and the statute does little to compensate malpractice victims. The Louisiana Supreme Court stated as much in the *Sibley* decision, noting that:

We are not unmindful of hardships that this decision may work upon the plaintiff, nor insensitive to the personal tragedy suffered by Ms. Sibley. Aware that the greater good hoped to be achieved by this statute is abstract and remote, and that the statute's application in this case seems harsh and immediate, we can only defer to the wisdom of the legislature of its passage of the law and note that it is our duty to interpret and apply that law as objectively and fairly as we can.⁸⁴

This line of analysis questions the purpose of general tort law. From an economic perspective, tort law, such as medical malpractice actions, should allocate the cost of accidents to those in the best position to minimize those costs.⁸⁵ The function of the law, then, should be to optimize, not necessarily minimize, the number of accidents.⁸⁶ Judge Ezell detailed this argument in his concurring opinion in the *Arrington* decision. In dealing with rising insurance premiums, the states should seek to optimize negligent acts by health care providers.⁸⁷ Ezell correctly noted that shielding

83. *St. Paul Fire & Marine Ins. Co. v. EUSEA*, 775 So. 2d 32, 36 (La. App. 1st Cir. 2000).

84. *Sibley v. Bd. of Supervisors of La. St. Univ.*, 446 So. 2d 760, 768 (La. App. 1st Cir. 1983), *aff'd*, 462 So. 2d 149 (La.), *aff'd in part, rev'd in part on reh'g*, 477 So. 2d 1094 (La. 1985), *on remand*, 490 So. 2d 307 (La. App. 1st Cir. 1986).

85. DAVID W. BARNES & LYNN A. STOUT, *THE ECONOMIC ANALYSIS OF TORT LAW* 27 (1992).

86. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 13 (1987). Optimizing the number of accidents is an aspect of positive economic theory, whereby resources are most efficiently used. Using the Hand Formula, the potential tortfeasor would be negligent if the burden of precautions (B) is less than the probability of harm multiplied by the gravity of the injury (PL). *Id.* at 85. Under this analysis, reducing the number of medical accidents to zero would require physicians to take precautions that would necessarily be greater than the probability multiplied by cost. An extrapolation of this analysis in practice would lead to the illogical situation where physicians would run costly precautionary tests and perform potentially unnecessary procedures to guard against rare complications and injuries.

87. *Arrington v. ER Physicians Group*, 940 So. 2d 777, 785 (La. App. 3d Cir. 2006) (Ezell, J., concurring).

providers from liability under the Medical Malpractice Act effectively negated the deterrent effect of the tort law.⁸⁸

The Louisiana statute effectively supports one purpose of the legislation—protection of qualified health care providers from rising costs—while neglecting the other—providing fair and adequate relief to innocent medical malpractice victims. Health care providers are given the shield incentive to become a qualified health care provider under the language of the statute, knowing that medical malpractice claims have a strict cap and that the negligent provider's personal liability is limited generally to \$100,000. These providers are given little incentive to decrease the occurrence of actual malpractice incidents because—especially noting the decreasing real value of their liability—the statute provides extensive protection. Judge Ezell's stinging criticism of the statute included the fact that he could not determine a basis for the statute other than the protection of health care providers at the expense of seriously injured patients.⁸⁹

Additionally, there is a weak relationship between increases in medical malpractice insurance premiums and damage awards for medical malpractice. Strong statistical evidence actually shows that other factors may be controlling.⁹⁰ Insurers set premiums based on several factors: the estimated payout to particular groups of doctors, the uncertainty of that estimate, estimated expenses for the year and predicted income, and the desired profit rate.⁹¹ Insurance companies, like other businesses, invest funds to generate income. Also, the general insurance market is subject to cyclical variations. During the initial availability and affordability insurance crises of the early 1970s, changes in the financial markets—including underwriting and investments—contributed to the issue.⁹² Losses, along with other cost considerations, contributed to the rising premiums.⁹³

The Supreme Court of Texas also considered the inadequacy of legislative evidence and history when it held that the Texas limitation on medical malpractice damages was unconstitutional in *Lucas v. United States*.⁹⁴ The plaintiff in *Lucas*, the parent of a child permanently paralyzed by a penicillin shot, sought constitutional relief after being granted damages in excess of the

88. *Id.*

89. *Id.*

90. MELLO, *supra* note 5, at 11.

91. *Id.* at 1.

92. DANZON, *supra* note 7, at 103.

93. *Id.* at 105. Author cites model for impact of capital, tax rates, the return on assets, and the premium capital ratio on the fair insurance premium.

94. 757 S.W.2d 687, 692 (Tex. 1988).

statutory limit.⁹⁵ The case concerned a very similar issue to the question certified to the Louisiana Supreme Court in *Arrington*: whether the limitation on medical malpractice damages was consistent with the Texas Constitution's open courts clause, article 1, section 13.⁹⁶ Section 13 guarantees that "all courts shall be open" and that plaintiffs "shall have a remedy by due course of law."⁹⁷ Holding that the limitation was unconstitutional, the Texas Supreme Court noted legislative history which admitted that changes in the insurance system "[m]ay or may not have an effect" on the state's insurance rates.⁹⁸ The court cited the unreasonableness and arbitrariness of the limit as a "speculative experiment" with insurance rates; the court concluded that a determination of the rationality of awards was a duty of the judicial branch, not the legislature.⁹⁹

It is reasonable to find a relationship between the insurance industry and claim costs as a factor in the larger medical malpractice issue,¹⁰⁰ but the Louisiana legislature should not rely upon the medical malpractice cap to fix the whole problem. The legislature and the supreme court should look to the speculative nature of the Medical Malpractice Act, as cited to in *Lucas*, as proof that capping awards will not end problems with insurance rates. This "solution" continues to place the burden of costs squarely on the shoulders of the most seriously injured malpractice victims. Given the heightened scrutiny standard proposed in this Comment, the State should look at the adequacy of the real dollar figure provided in the cap and allow for adjustments which would keep the cap in line with economic fluctuations.

In addition to the recent decisions by the Louisiana Third Circuit Court of Appeal in *Arrington* and *Taylor*, the United States Court of Appeals for the Fifth Circuit has also shown an inclination that it is willing to consider the Medical Malpractice Act's limitation on liability as unconstitutional. Citing to rulings by the Louisiana Supreme Court, the *Moody v. United National Insurance Co.* court declared that it was limited and bound by

95. *Id.* at 688. The plaintiffs were awarded \$1,500,000 for pain and suffering for their 14-month-old son's permanent paralysis due to a wrongfully injected penicillin shot. The limit on civil liabilities for damages of a health care provider for all past and future noneconomic damages was limited to \$500,000 by statute. *Id.* at 689.

96. *Id.* at 687.

97. TEX. CONST. art. I, § 13.

98. *Lucas*, 757 S.W.2d at 691.

99. *Id.*

100. MELLO, *supra* note 5, at 11.

those precedents¹⁰¹—as the Louisiana Supreme Court had previously declared the act constitutional, the Fifth Circuit felt compelled not to disagree.

Under a heightened scrutiny standard, the low dollar value of the cap provided in the Louisiana Medical Malpractice Act does not establish a close enough connection to both purposes of the statute. While adequately providing for the protection of health care providers, the unchanged statute no longer adequately protects medical malpractice victims—forcing those grievously injured parties to shoulder the burden of their claims.

The current limitation on liability contained in the Medical Malpractice Act is unconstitutional under article 1, section 3 of the Louisiana Constitution. The act violates the principles of equal protection by creating an arbitrary and unreasonable limitation to recovery for a growing population of medical malpractice victims. As the cap continues to lose real dollar value, more tort victims will be unable to receive full compensation.

B. Article 1, Section 22: The Access to Courts/Due Process Clauses

The Louisiana State Constitution's Access to Courts clause provides: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation or other rights."¹⁰²

Williams v. Kushner discussed the pertinence of the medical malpractice cap in an "adequate remedy at law" argument.¹⁰³ After settling with the negligent doctor for \$100,000, the father of the injured child sued to enforce a jury award of \$1,829,000.¹⁰⁴ At the jury trial, the plaintiff presented evidence of an extensive birth injury that caused damage to the child's brachial plexus, the nerves beginning in the spinal cord and traveling into the arm.¹⁰⁵ Evidence of the child's disability, impediments to his social and psychological development, and factors concerning the child's future wage loss were all presented.¹⁰⁶ The father challenged the

101. *Moody v. United Nat'l Ins. Co.*, 657 So. 2d 236, 239 (La. App. 5th Cir.), writ denied, 663 So. 2d 713 (La. 1995).

102. LA. CONST. art. I, § 22.

103. *Williams v. Kushner*, 524 So. 2d 191 (La. App. 4th Cir. 1988), *aff'd*, 549 So. 2d 294 (La. 1989).

104. *Id.* at 192.

105. *Id.*

106. *Id.*

limitation imposed on the child's recovery under the Louisiana Constitution, article 1, sections 3 and 22.¹⁰⁷

The fourth circuit concluded that the child sustained damages of at least \$500,000 but would not affirm the jury verdict; the damage conclusion was only a finding which allowed for the court to consider the unconstitutionality of the statutory limit.¹⁰⁸ The court reasoned that the Access to Courts clause only ensures that courts will remain open to provide legislatively-fashioned remedies.¹⁰⁹ The court essentially found that Williams was afforded his day in court—he was not denied access to a forum in which to present his claim for recovery. The Constitution, the court held, provided only for an open forum for a legislative remedy.

The *Williams* court improperly construed the state constitutional language too narrowly. In adhering to the strict interpretation of "access," the court neglected to consider the rest of the clause—that a plaintiff would receive an adequate remedy, administered without denial, partiality, or unreasonable delay. If the plaintiff to a medical malpractice action is allowed access to the courts but his judicially determined recovery is so limited as to be inadequate, then the statutory limitation is not an open court proceeding at all.

The "not open" argument was also utilized by Chief Justice Dixon, in dissent, who argued that since an adequate remedy must necessarily encompass all damages proven, the Louisiana cap is prohibited by the state constitution.¹¹⁰ The provision of adequate remedy must include more than a simple access to courts for the process to be meaningful and fair.¹¹¹ Dixon also relied upon Louisiana jurisprudence to conclude that the determination of adequacy has historically been an issue for the judiciary.¹¹² Dixon's reading of article 1, section 22 equated adequacy with a balancing of the monetary award for a plaintiff and his sustained losses.¹¹³

The Louisiana medical malpractice cap vitiates all the findings from discovery proceedings and evidence presented before the court which led to a determination that the plaintiff was entitled to damages above the damages ceiling. Therefore, the foundation of the constitutional challenge to the Medical Malpractice Act should

107. *Id.*

108. *Id.* at 193.

109. *Id.* at 196.

110. *Williams v. Kushner*, 549 So. 2d 294, 308 (La. 1989) (Dixon, C.J., dissenting).

111. *Id.* at 309.

112. *Id.*

113. *Id.* at 311.

be the denial of adequate remedy and the partiality shown to negligent health care providers.

1. A Predetermined Limit on Plaintiff Recovery is a Denial of an Adequate Remedy

One economic purpose of tort law is to internalize the costs of accidents.¹¹⁴ The legislatively created system in Louisiana tries to achieve this goal by creating a process through which qualified health care providers pay into a Patient's Compensation Fund and are required to carry malpractice insurance.¹¹⁵ The physicians themselves shoulder the costs of these provisions by paying into the system. Under the plain language of the statute and a firm line of Louisiana jurisprudence, a plaintiff who suffers damages in excess of the cap is left without recourse.¹¹⁶ The limitation on liability would then force those excess costs to fall outside the tort recovery process.

Such a situation begs the question of fairness. It is unreasonable to impose this financial burden on plaintiffs, especially those who are most severely injured and therefore most in need of compensation.¹¹⁷ Additionally, considering the devaluation of the cap, this burden is more likely to fall upon an increasing number of plaintiffs because damage awards will increase with inflation while the cap will remain the same. Inflation, or the continual increase in the price level,¹¹⁸ is a virtual certainty in the United States economy over long periods of time.¹¹⁹ The \$500,000 cap will grow even more unreasonable as prices increase and inflation changes the value of the dollar. As prices and wages rise, plaintiffs are more likely to receive jury

114. LANDES & POSNER, *supra* note 87, at 187.

115. LA. REV. STAT. ANN. § 40:1299.42, 1299.44 (2008).

116. Taylor v. Clement, 940 So. 2d 796, 797 (La. App. 3d Cir. 2006), *rev'd*, 947 So. 2d 721 (La. 2007). The jury awarded the Taylors damages in excess of the statutory limit, and the judge reduced that award.

117. Carson v. Maurer, 424 A.2d 825, 837 (N.H. 1980), *overruled by* Cmty. Res. for Justice, Inc. v. City of Manchester, 917 A.2d 707 (N.H. 2007).

118. FREDERIC S. MISHKIN, THE ECONOMICS OF MONEY, BANKING, AND FINANCIAL MARKETS 10 (7th ed. 2004).

119. See generally AHARON YORAN, THE EFFECT OF INFLATION ON CIVIL AND TAX LIABILITY vii (1983) (Author discusses the prevalence of provisions accounting for inflation in the Preface, showing the pervasiveness of inflation considerations throughout all areas of public policy.). This Comment assumes that inflation will continue to occur in the domestic economy. Though, theoretically, deflation is a possibility, the overall decrease in real prices and the value of money would generally decrease the size of medical malpractice awards leading to a situation where all damages would fall within the cap.

awards in excess of the limitation—accounting for costs of the victim's medical care, lost wages, pain and suffering, and general damages.

Several jurisdictions have ruled caps unconstitutional under this adequacy argument.¹²⁰ As previously cited, the Texas Supreme Court made the same conclusion in *Lucas v. United States*, holding that the \$500,000 cap was an unconstitutional denial of open courts and adequate remedy.¹²¹ The court, citing to the decisions in *Smith* and *Carson v. Maurer*,¹²² agreed that an open courts constitutional guarantee had to protect against more than abolitions on the right to access.¹²³

The reasoning of other jurisdictions should also apply to Louisiana because article 1, section 22 must provide a meaningful access to the courts. A scenario in which a grievously injured plaintiff could bring a case against a negligent health care provider, prove damages in excess of the limitation, be awarded those damages, and then not recover fully due to state statute renders the trial worthless. True, the victim receives some compensation for injuries, but is left with the burden of his damages above the statutory ceiling.

Focusing on the due process provision of its constitution, the Ohio Supreme Court also struck down the state's \$200,000 general damages cap in *Morris v. Savoy*.¹²⁴ The court declared the statute unconstitutional due to the lack of a real and substantial relation between awards above the state cap and rising medical malpractice insurance claims, and it ruled that the limitation on liability unreasonably and arbitrarily denied recovery.¹²⁵

A long-standing limit on plaintiff recovery renders the cap almost valueless to the victim. The Louisiana statute allows for a full trial proceeding—one where judge and jury make a determination of the facts and evidence—then minimizes those judicial conclusions by capping the plaintiff's award at a set dollar amount which continues to fall in real value. Such a statute denies the plaintiff access to courts by limiting his right to an adequate recovery of proven damages.

120. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 162 (Ala. 1991); *Morris v. Savoy*, 576 N.E.2d 765, 771 (Ohio 1991); *Lucas v. United States*, 757 S.W.2d 687, 692 (Tex. 1988); *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1089 (Fla. 1987).

121. *Lucas*, 757 S.W.2d at 692.

122. *Id.* at 691-92.

123. *Id.* at 692.

124. *Morris*, 576 N.E.2d at 771.

125. *Id.*

2. A Limitation on Recovery Expressly Designed to Shield an Industry or Class of Potential Tortfeasors Shows Unconstitutional Partiality

Article 1, section 22 provides that justice will be administered without denial, *partiality*, or unreasonable delay.¹²⁶ The limitation on liability that was expressly designed to provide for economic incentives in the medical malpractice insurance premium market now shows partiality toward the health care providers and insurance industry.

Justice Lemmon's dissent in *Butler v. Flint Goodrich Hospital* highlighted the lack of evidence that awards greater than \$500,000 contributed to the high cost of medical malpractice insurance premiums.¹²⁷ Calling the legislative history and evidence "extremely speculative," Lemmon considered the act a deprivation of victims' rights.¹²⁸ Justice Dennis, in a separate dissent, also questioned the causation analysis. Dennis stated that proponents may have supported the speculative and hypothetic statutory intent, but those parties "manifestly have failed to carry their burden of proving that the \$500,000 limitation of damages substantially furthers this purpose in reality."¹²⁹ A speculative end is insufficient to support limiting the damages of Louisiana's victims of medical malpractice.

The *Arrington* case similarly questioned the wisdom of the Medical Malpractice Act, stating the statute was passed "under the guise of the medical malpractice 'crisis' in order to make premiums reasonable and affordable for health care providers."¹³⁰ The balance that the Legislature speculatively hoped to strike now weighs heavily in favor of health care providers and their insurers.¹³¹ Despite an arguably legitimate legislative intent in 1975, expert testimony in the initial *Arrington* trial estimated that decreases in the value of the \$500,000 cap had eroded the limitation to approximately \$160,000, while a note by the court stated that the real value had reached \$146,435.¹³² As discussed above, this economic factor is not likely to go away or change. Despite the fact that all of the damages included in the state's

126. LA. CONST. art. I, § 22 (emphasis added).

127. *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517, 524 (La. 1992) (Lemmon, J., dissenting).

128. *Id.*

129. *Id.* at 525 (Dennis, J., dissenting).

130. *Arrington v. ER Physicians Group*, 940 So. 2d 777, 780–81 (La. App. 3d Cir. 2006), *vacated*, 947 So. 2d 724 (La. 2007).

131. *Id.* at 781.

132. *Id.*

general damages cap—including medical costs, wages, legal fees, etc.—have increased and will continue to increase with inflation, the cap has remained the same.

The changing economic conditions must tilt the balance in favor of victims' need for compensation over health care providers' cost concerns. From the analogy in *Butler*, the Medical Malpractice Act no longer provides an imperfect balance; it provides no balance at all. In order to adequately provide for victims, the state must address the constitutional challenges to the cap.

Under analysis from article 1, section 3, the limitation on liability denies medical malpractice victims equal protection by unreasonably and arbitrarily capping damages and wrongfully creating classes of victims. The act denies victims an adequate remedy provided without denial or partiality, essentially denying them due process as guaranteed by article 1, section 22. The limitation on liability, as providing for a general and unchanging damages cap of \$500,000, should be found unconstitutional.

III. THE SOLUTION

Cases concerning the constitutionality of medical malpractice liability limitation often cite to state or national legislative findings discussing the effects of "the medical malpractice crisis."¹³³ While many sources cite to issues within the insurance industry, the most commonly cited factor in rising medical costs is the impact of huge damage awards in medical malpractice cases.¹³⁴ The real interest of the state is indeed a delicate balance between health care providers' availability and affordability concerns and seriously injured victims' need for compensation.¹³⁵

This Comment takes issue with the decreasing real value of Louisiana's limitation on liability. Devaluation itself is the reason for the statute's unconstitutionality. A statute that accounts for devaluation—through an economic indicator or a multiplier to account for inflation—would not face the same constitutional fate.

133. *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517, 521 (La. 1992); *Williams v. Kushner*, 549 So. 2d 294, 305 (La. 1989) (Dixon, C.J., dissenting); *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988); *Sibley v. Bd. of Supervisors of La. St. Univ.*, 462 So. 2d 149, 152 (La. 1985); *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736, 741 (Ill. 1976); *Arrington*, 940 So. 2d at 780–81; *St. Paul Fire & Marine Ins. Co. v. Eusea*, 775 So. 2d 32, 36 (La. App. 1st Cir. 2000).

134. Richard K. Willard, *The Medical Malpractice Crisis and the Need for Tort Reform*, in *MEDICAL MALPRACTICE—TORT REFORM 5* (James E. Hammer III & B.R. Jennings eds., 1987).

135. Schwarz, *supra* note 5, at 17.

A limitation on liability that equitably balances the state's need to protect health care providers from run-away juries and victims' need for compensation is constitutionally sound.

The Medical Malpractice Act supplies a general damages cap on medical malpractice damages, in contrast with other states that cap only noneconomic damages.¹³⁶ Noneconomic damages are often cited as compensation for "pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonpecuniary damages,"¹³⁷ while total damages also apply to economic losses such as lost wages and medical costs.¹³⁸ Twenty-six states have some kind of limitation on damages, but the statutes vary widely.¹³⁹ Only five states—Indiana, Louisiana, Nebraska, New Mexico, and Virginia—have strictly a total damage cap.¹⁴⁰ Interestingly, Louisiana's total cap is the lowest of the five.¹⁴¹ The reality of the statutory construction is that states with only a noneconomic damages cap allow plaintiffs to recover for all medical costs and lost wages. By limiting virtually all damages under its statute, Louisiana is potentially providing the lowest recovery for seriously injured victims in the nation, a trend that, while not inherently unconstitutional, might influence the legislature.

The option of providing compensation for all economic damages and leaving only pain and suffering awards beneath the cap would accomplish Louisiana's legislative purposes. Plaintiffs would receive compensation for economic and medical damages proved at trial; health care providers would also receive the benefit

136. CAL. CIV. CODE § 3333.2(b) (West 1997); FLA. STAT. ANN. § 766.118(2)(b) (West 2005); HAW. REV. STAT. ANN. § 663-8.7 (LexisNexis 2007); KAN. STAT. ANN. § 60-19a02(b) (2005); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (West 2002); MASS. GEN. LAWS ch. 231 § 60H (2000); MICH. COMP. LAWS ANN. § 600.1483 (West 1996); MISS. CODE ANN. § 11-1-60 (Supp. 2005); MONT. CODE ANN. § 25-9-411 (2007); OHIO REV. CODE ANN. § 2323.43 (West 2004); OKLA. STAT. ANN. tit. 63 § 1-1708.1F (West 2004); UTAH CODE ANN. § 78B-3-410 (2008); W. VA. CODE ANN. § 55-7B-8(a) (West Supp. 2008); WIS. STAT. ANN. § 893.55 (West 2006).

137. *Smith v. Dep't. of Ins.*, 507 So. 2d 1080, 1087 (Fla. 1987). *See also Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 158 (Ala. 1991) (defining noneconomic damages as "losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium and other nonpecuniary damage").

138. MELLO, *supra* note 5, at 7.

139. *Id.*

140. VA. CODE ANN. § 8.01-581.15 (West 2001); Nat'l Conference of State Legislatures, *Med. Malpractice: State Med. Liab. Laws*, <http://www.ncsl.org/standcomm/sclaw/StateMedliabilitylaws2007.htm> (last visited Oct. 9, 2008).

141. Nat'l Conference of State Legislatures, *supra* note 140.

of the limitation on pain and suffering damages to control for excessive jury verdicts. This is one option for the State.

In addition to distinguishing between types of damages, several states have passed creative methods for ensuring that limitations on liability keep pace with current economic conditions and prices. Four of these statutory options are listed and discussed below, some with continuing reservations about equal protection issues.

A. Adjustments Based on Inflation and the Consumer Price Index

Inflation, very simply, is an economic condition where prices continue to rise year after year.¹⁴² The inflation rate is calculated as a percentage of the increase change over the course of a number of years.¹⁴³ The Consumer Price Index (CPI) is an indicator of aggregate price levels, measured by comparing prices from a sampling of goods and services yearly.¹⁴⁴ As representative of changing prices, CPI is often used as a calculator for inflation. Additionally, as a practical matter, CPI is also readily available; the indicator is published by the Department of Labor Bureau of Labor Statistics with monthly updates.¹⁴⁵ States can easily calculate the change in their limitation by using the year of enactment—or any year they choose—as the base and multiply by the indicator appropriate for the number of years necessary.

West Virginia caps noneconomic damages at \$250,000.¹⁴⁶ The statute accounts for inflation using the CPI with 2004 as its base year.¹⁴⁷ Arkansas caps punitive damages at \$250,000 or three times the awarded compensatory damages, not to exceed \$1,000,000.¹⁴⁸ It applied adjustments beginning January 1, 2006, at planned three-year intervals based on the CPI, and allowed for oversight by its Administrative Office of the Courts.¹⁴⁹ Michigan also applies the CPI to its noneconomic damages cap, as adjusted by its state treasurer.¹⁵⁰

Statutes cite to the Department of Labor or the Administrative Office of the Courts¹⁵¹ as common sources for the indicator.¹⁵²

142. MISHKIN, *supra* note 118.

143. *Id.* at 11.

144. *Id.* at 21.

145. See generally U.S. Dep't of Labor, Bureau of Labor Statistics, <http://www.bls.gov/cpi/> (last visited Oct. 9, 2008).

146. W. VA. CODE ANN. § 55-7B-8(a) (West Supp. 2008).

147. See § 55-7B-8(c).

148. ARK. CODE ANN. § 16-55-208(a) (Supp. 2005).

149. See § 16-55-208(c).

150. MICH. COMP. LAWS ANN. § 600.1483(4) (West 1996).

151. ARK. CODE ANN. § 16-55-208(c).

This change would be easily manageable for Louisiana. By amending the existing statute, the Legislature could add language to establish a base year and a time period for adjustments. Additionally, the State could use the same United States multiplier as the other states.

Application an economic indicator for inflation would involve multiplying the given percentage of inflation for each year. The Michigan statute gives authority to the state treasurer to adjust the limitation annually.¹⁵³ Louisiana could similarly amend the cap statute, section 40:1299.42, by giving this power to the state treasurer. This amendment would allow the cap to incrementally increase each year with inflation. That multiplier alone would take into account the real value of money, a consideration in wages, costs, and prices.

B. Adjustments Based on Wages

Idaho establishes an increase/decrease factor based on the State's average wage; the State enacted a \$250,000 cap on noneconomic damages.¹⁵⁴ Beginning July 1, 2004, the cap changed according to the Idaho Industrial Commissions percentage adjustments to the average wage computation.¹⁵⁵ The State is essentially trying to calculate its own local price index by making changes in state wages from year-to-year. The Idaho wage determination is made by a state commission that considers weekly wages as reported by local employers for each calendar week in the year.¹⁵⁶

This method necessarily employs a local approach. If the legislature chose to make the adjustments so specific to Louisiana, there would be several practical issues. Based on the reporting requirement, the State would have to select a means by which to gather weekly income data for the year, process the information, publish an average, and calculate the average percentage change using the chosen base year. The process does account for state wages, though, which would provide an indicator for increases similar to the use of an indicator such as the CPI.

152. *Id.*; W. VA. CODE ANN. § 55-7B-8(c).

153. MICH. COMP. LAWS ANN. § 600.1483(4).

154. IDAHO CODE ANN. § 6-1603(1) (2006).

155. *Id.*

156. § 72-409(2).

C. Adjustments Based on Victim's Life Expectancy

Alaska takes a unique approach to noneconomic damages. When damages are awarded for a serious injury, defined as "severe permanent physical impairment or severe disfigurement," the cap on noneconomic damages may not exceed \$1,000,000 or the victim's life expectancy (in years) multiplied by \$25,000, whichever is greater.¹⁵⁷ Noneconomic damages arising from death or an injury not included in the severe category have a cap of \$400,000 or the victim's life expectancy (in years) multiplied by \$8,000, whichever is greater.¹⁵⁸

The intent of this statute is clearly to value the remaining life of a victim who must continue with a catastrophic injury. Arguably, as the victim's annual salary increases, the statute would not provide above a certain income level. This general cap provides for the liability protection the Louisiana legislature considered for the State's Medical Malpractice Act, but a life expectancy multiplier allows for a case-by-case determination based on the extent of a victim's injury. Life expectancy estimates would likely require expert testimony and additional court resources for a jury or trial court.¹⁵⁹

Washington adopted a mixed approach to life expectancy and wage calculations in its limitation on noneconomic damages. A plaintiff may not recover noneconomic damages greater than 0.43 multiplied by the average annual wage and the life expectancy of the victim.¹⁶⁰ Additionally, the victim's life expectancy cannot be valued at less than fifteen years.¹⁶¹ The cap is determined on a completely individualized basis. The statute has similar potential legislative concerns as several of the above options because it depends on wage reporting, internal state calculation, and interpretation of expert testimony by the court.¹⁶²

D. Flat \$15,000 Increase Annually

Maryland also has a noneconomic damages cap set at \$650,000 for actions arising from January 1, 2005, through December 31, 2008.¹⁶³ Beginning January 1, 2009, however, the statute has a flat

157. ALASKA STAT. § 09.17.010(c) (2006).

158. *See* § 09.17.010(b).

159. *See generally* LA. CODE EVID. art. 702 (2006).

160. WASH. REV. CODE ANN. § 4.56.250(2) (West 2006).

161. *Id.*

162. *See generally* LA. CODE EVID. art. 702.

163. MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-09(b)(1)(i) (West 2002).

\$15,000 increase each year.¹⁶⁴ A flat increase would be one of the easiest plans to implement. It would only require an amendment to the Louisiana statute and simple addition by the trial court. A small consideration could be the actual inflation rate and the concern that, given future economic conditions, \$15,000 might not be sufficient to account for increasing prices or adequate control for a stabilization or plateau in the inflation rate.

E. Inflation Adjustment (CPI) Should be Utilized to Adjust the Cap

The State of Louisiana already employs an inflation adjuster, as determined by the CPI, in several other areas governed by the Louisiana Revised Statutes.¹⁶⁵ Since the State already employs such an adjuster for financing pensions, determining oil and gas revenues, public contracts limits, and providing a tax credit for child care directors and staff,¹⁶⁶ the State could use the same mechanism to annually adjust the medical malpractice cap. Louisiana Revised Statutes section 30:302 expressly delegates the adjustment task to the state treasurer.¹⁶⁷ The State has models for implementation and a method by which an inflation indicator is already utilized by state agencies. A practical solution would be to amend Louisiana Revised Statutes section 40:1299.42 to provide for the inflation multiplier.

IV. CONCLUSION

The constitutionality of the Louisiana Medical Malpractice Act is not merely an academic topic left to the likes of law reviews and scholarly speculation; the issue is more than likely to reappear in Louisiana courts. Indeed, the Louisiana Third Circuit Court of Appeal vacated its judgment in *Taylor v. Clement* on July 6, 2007, and remanded the case to the trial court with instructions.¹⁶⁸ The issue is returning to the trial court to fix the procedural issues upon which the Louisiana Supreme Court focused when it avoided the constitutionality question. Procedural problems solved, the case will undoubtedly cycle back to the supreme court. Without an amendment to the current statute by the Louisiana legislature, the

164. See § 3-2A-09(b)(1)(ii).

165. LA. REV. STAT. ANN. § 11:2227(D)(5) (2006); LA. REV. STAT. ANN. § 30:302 (2007); LA. REV. STAT. ANN. § 38:2212(A)(1)(d)(iii) (2005); LA. REV. STAT. ANN. § 47:6106(C) (Supp. 2008).

166. *Id.*

167. See § 30:302.

168. *Taylor v. Clement*, 970 So. 2d 545 (La. App. 3d Cir.), writ denied, 969 So. 2d 630 (La. 2007).

court will examine these constitutionality issues under article 1, sections 3 and 22. The “imperfect” balance for medical malpractice victims is broken, and it’s up to the legislature or, ultimately, the Louisiana Supreme Court to fix it.¹⁶⁹

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169. During the 2008 Regular Session of the Louisiana Legislature, Representative John Bel Edwards introduced House Bill No. 664, a proposal to amend Revised Statutes section 40:1299.42 on the limitation of recovery. The amendment included an adjustment for the limit based upon the national Consumer Price Index, with no adjustment (increase or decrease) totaling more than 4%. The bill included a procedural subsection whereby the adjustment would be made on October 1 of each year beginning in 2010. The bill was assigned to the House Civil Law and Procedure Committee, but no further action was taken.

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